In the affidavit supporting the notice of motion, the secretary of the Bar Council of the Malaysian Bar gave a summary of the grounds for objecting to all Supreme Court judges from hearing the committal proceedings. The summary of the grounds are contained in para 3 of the affidavit as follows.

> 3 A brief summary of the grounds for objection in relation to the respective Supreme Court judges are given below:
> 3.1 The Honourable Tan Sri Dato Abdul Hamid bin Hj Omar – he is the defendant in this proceedings.
> 3.2 The Honourable Chief Justice of Malaya Tan Sri Datuk Hashim Yeop Abdullah Sani, Dato Harun Mahmud Hashim, Dato Mohamed Yusoff bin Mohamed and Datuk Gunn Chit Tuan – members of the panel of Supreme Court judges who sat at the Supreme Court hearing on the 21st and 22nd July 1988 [*Tun Dato Haji Mohamed Salleh bin Abas* v *Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149] and who set aside the order of the Supreme Court dated 2 July 1988, the circumstances relating to which are connected to the committal proceedings herein.
> 3.3 The Honourable Mr Justice Tan Sri Datuk Lee Hun Hoe – one of the defendants in the proceedings before the Supreme Court, which resulted in the said order of the Supreme Court of 2 July 1988.
> 3.4 The Honourable Mr Justice Tan Sri Dato Haji Mohamed Azmi bin Dato Haji Kamaruddin and the Honourable Mr Justice Tan Sri Dato Seri Dr Eusoffe Abdoolcader – two of the Supreme Court judges who heard the application and granted the said order of 2 July 1988 in the proceedings which were sought to be prevented by the respondent.
> 3.5 The Honourable Mr Justice Dato Ajaib Singh – the judge in the proceeding which was the subject matter of the application to the Supreme Court resulting in the said order of 2 July 1988.

In para 4 of the same affidavit the secretary of the Bar Council also stated that it would be improper for the Lord President or the Supreme Court judge who is next most senior to him to appoint any High Court judges to hear the committal proceedings.

Firstly, on the question of disqualification. As regards the three of us here the only objection would seem to be that we sat on 21 and 22 July 1988 to consider the order of prohibition issued against the tribunal. The Supreme Court which sat on the two days mentioned was only concerned with the legality or propriety of the order of prohibition. We were only concerned with questions of law and not concerned with the circumstances which brought about the committal proceedings.

Secondly, it would seem clear from the affidavit on behalf of the Malaysian Bar that the applicant also considers that all the judges of the superior courts should be disqualified and that the only solution is to invoke art 122(1A) of the Federal Constitution for the appointment of additional judges of the Supreme Court by the Yang di-Pertuan Agong on the advice of the Lord President. This is an interesting point but fraught with problems. Firstly, art 122(1A) speaks of 'advice' of the Lord President. Therefore the Lord President is required, if he wants the Yang di-Pertuan Agong to appoint additional judges under art 122(1A), to nominate the additional judges. This obviously will not solve the problem posed by the applicant.

We also agree with Mr Sri Ram (who was invited to address the court) that a direction or order as requested by the applicant would be in the nature of a mandamus and the Supreme Court being essentially an appellate and referential court has no jurisdiction to make such an order.

Finally we also do not think that the Supreme Court has the power to order or direct the Lord President as to how he should exercise his constitutional functions under art 122(1A) of the Constitution.

In conclusion we do not consider that we should disqualify ourselves on the ground of bias or likelihood of bias because there is absolutely no reason to do so. As regards the alternative prayer for stay since we are of the view that we are not disqualified from hearing the application for leave, we see no reason to consider the alternative prayer for stay.

Notice of motion is accordingly dismissed.

Order accordingly.

Solicitors: *Suhaimi Khor Zulkifli & Chang*; *Lee, Perara & Tan*; *Jackson & Masacorale*; *Fernandez & Co*; *Nashir Johal & Co*; *CL Sequerah & Co.*

Reported by *Prof Ahmad Ibrahim*

Sabah Banking Employees' Union v Sabah Commercial Banks' Association

SUPREME COURT (KOTA KINABALU) – CIVIL APPEAL NO 501 OF 1987
ABDUL HAMID LP, LEE HUN HOE CJ (BORNEO) AND MOHAMED YUSOFF SCJ
3 NOVEMBER 1988 AND 5 MAY 1989

Administrative Law – Certiorari to quash award of Industrial Court – Proper approach to be adopted in exercising supervisory role in regard to Industrial Court awards – Extent to which awards of Industrial Court are statutorily protected from correction and supervision by High Court – Industrial Relations Act 1967, ss 30 & 33B

In this case negotiations had been conducted between the appellant and respondent for a new collective agreement. The parties reached agreement on all issues except the quantum of retirement benefits. The agreed terms of the collective agree-

ment were embodied in a document which was deposited with the Industrial Court which took cognizance of it. The dispute relating to retirement benefits was referred to the Industrial Court. The Industrial Court made an award which provided in part that with effect from 1 December 1985 the banks shall contribute each month 15% of the wages for that month to the Employees Provident Fund, such contribution to be deemed inclusive of any employer's contribution to the Fund as may be prescribed from time to time. The respondent applied for a writ of certiorari to quash the award. The High Court quashed the award on the grounds that no basis could be found for the quantum of retirement benefits and that, if any basis existed, it would have been an error of law. The appellant appealed.

Held, allowing the appeal:

(1) Industrial Court awards are statutorily sheltered from appellate review by s 33B(1) of the Industrial Relations Act 1967, which provides that 'an award, decision or order of the court shall be final and conclusive and shall not be challenged, appealed against, reviewed, quashed or called in question in any court'. Nonetheless it has been consistently held that such privative or ouster clause cannot proscribe certiorari against awards that exceed the inferior tribunal's jurisdiction.

(2) The ouster clause will not have the effect of ousting the power to issue certiorari although the tribunal had jurisdiction to enter on the inquiry if it has done or failed to do something in the inquiry which is of such a nature that its decision is a nullity. The decision may be a nullity by reason of a breach or failure to comply with the requirements of natural justice. The writ of certiorari clearly survives because it is fundamental to the court's constitutional and common law role as the guarantor of due process and the fair administration of the law.

(3) Another ground for certiorari is that the decision maker acted in excess of jurisdiction. Such jurisdictional error occurs where a tribunal enters into an inquiry and makes a decision over which it has no authority to do.

(4) In this case it is clear from the record and oral argument that the respondent did not complain of any breach of the principles of natural justice. Nor did the respondent claim that the court lacked jurisdiction to enter into the general inquiry it did. The disagreement over retirement benefits was clearly a trade dispute properly before the Industrial Court upon reference made to it.

(5) There is no validity in the respondent's contention that the Industrial Court acted outside the scope of its authority when awarding retirement benefits in excess of the 11% set by the Employees Provident Fund Act 1957. The learned judge below had granted certiorari on this ground alone holding the excess to be an illegal payment and without basis whatsoever. The Industrial Court in fact asked itself the question put to it by the parties and answered that question in the very terms used by both the appellant and the respondent.

(6) It cannot be said that the Industrial Court acted in excess of jurisdiction bearing in mind that the retrospective date of the award is not in breach of or inconsistent with s 30(7) of the Industrial Relations Act 1967. Moreover it was the court's function to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form and above all there was the fact that the parties had agreed to refer the dispute several months earlier.

(7) There was no ground whatsoever for the court below to interfere with the award made by the Industrial Court. The order of the High Court is therefore set aside and the award of the Industrial Court reinstated.

Cases referred to

1 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers' Employees Union & Ors* [1980] 2 MLJ 165 (refd)
2 *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147 (refd)
3 *Non-Metallic Mineral Products Manufacturing Employees Union* v *Malaya Glass Factory Bhd* [1985] 1 MLJ 129 (refd)
4 *Federal Hotel Sdn Bhd* v *National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 (refd)
5 *Dr A Dutt* v *Assunta Hospital* [1981] 1 MLJ 304 (refd)

Legislation referred to

Employees Provident Fund Act 1957 s 7(1)
Industrial Relations Act 1967 ss 30(4), (6), (7), 33B(1)

Appeal from: Originating Motion No 4 of 1986 (High Court, Kota Kinabalu)

KP Gengadharan (*Norbert Yapp* with him) for the appellant.

TM Varughese (*Dr Tunku Sofiah Jewa* with him) for the respondent.

Cur Adv Vult

Abdul Hamid LP (delivering the judgment of the court): The question we shall have to decide in this appeal is whether the High Court properly entertained the motion for certiorari to quash an award from the Industrial Court. In determining the question it is necessary for us to consider the proper approach the court below should take in exercising its supervisory role in regard to an Industrial Court award which, in law, is somewhat protected from full appellate review.

The appellant, Sabah Banking Employees' Union, represents non-officer bank employees in the state of Sabah. In 1985, labour contract negotiations were conducted between the appellant and the Sabah Commercial Banks' Association ('the respondent') for a new collective labour agreement covering bank branches in that state. The parties reached agreement on all issues except the quantum of retirement benefits. During negotiations, the respondent proposed retirement benefits of 15% of the employee's basic salary while the appellant had sought retirement benefits based on 15% of all wages, including the 'Sabah allowance', an allowance given to compensate for the state's high cost-of-living.

In July 1985, the parties signed a document embodying the agreed terms of a new collective labour agreement. This agreement was deposited with the Industrial Court which took cognizance of it on 9 August 1985. The parties also made a joint application to the Minister of Labour under s 26(1) of the Industrial Relations Act 1967 ('the Act') to settle the quantum of retirement benefits. Pursuant to s 26(1) of the Act, the Minister of Labour referred this dispute to the Industrial Court for adjudication. On 28 December 1985, the court made Award No 268/85 which provided, in part, that:

(4) ...
(a) with effect from 1 December 1985, the banks shall contribute each month 15% of the wages for that month to the Employees Provident Fund. Such contribution shall be deemed to be inclusive of any employer's contribution to the Employees Provident Fund as may be prescribed by law from time to time;
(b) for the purpose of sub-clause (a) above, 'wages' shall have the meaning assigned to it by the EPF Act 1951.

The respondent applied for a writ of certiorari to quash the award. On 2 September 1987, the High Court of Borneo allowed the application and quashed Award No 268/85 on the grounds that no basis could be found for the quantum of retirement benefits and that, if any basis existed, it would have been an error of law. Hence this appeal.

As in other certiorari cases considered by this court and by the Privy Council, two essential questions must be borne in mind. First, to what degree are awards of the Industrial Court statutorily protected from correction and supervision by the High Courts? Second, is this award infirm in such a way that it should have been quashed by the High Court in exercising its limited supervisory function?

The first of these two questions has caused some confusion as to when and under what circumstances a writ of certiorari is appropriate against an Industrial Court award.

Industrial Court awards are statutorily sheltered from appellate review by s 33B(1) of the Act which provides that 'an award, decision or order of the court ... shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed, or called in question in any court.' Nonetheless, it has been consistently held that such privative or ouster clauses cannot proscribe certiorari against awards that exceed the inferior tribunal's jurisdiction. The Privy Council so interpreted this same ouster clause when it was then s 29(3) of the Act: *South East Asia Fire Bricks* v *Non-Metallic Mineral Products Manufacturer's Employees Union*.[1] And following the decision of the House of Lords in *Anisminic Ltd* v *Foreign Compensation Commission*[2] Lord Reid in his speech made it clear that the ouster clause will not have the effect of ousting the power 'although the tribunal had jurisdiction to enter on the inquiry if it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity'. The decision may be a nullity by reason of a breach or failure to comply with the requirements of natural justice. The writ of certiorari clearly survives because it is fundamental to the courts' constitutional and common law role as the guarantors of due process and the fair administration of law.

Another ground for certiorari is that the decision maker acted in excess of its jurisdiction. Such jurisdictional error occurs where a tribunal enters into an inquiry and makes a decision over which it has no authority to do. Such an error occurred in *Non-Metallic Mineral Products Manufacturing Employees Union* v *Malaya Glass Factory Bhd*.[3] In that case, an Industrial Court award dealt with the 'check-off', ie automatic deduction, of union dues. The Federal Court held that this provision of the award was in excess of the court's jurisdiction to handle trade disputes as defined in s 2 of the Act, ie it is not connected with the employment or non-employment or the terms of employment or the conditions of work.

We turn now to consider whether the relevant parts of Industrial Court Award No 628 should have been quashed. The argument against the award rests on statutory provisions in the Employees Provident Fund Act 1951 ('the EPF Act'). The EPF Act establishes a national Employees Provident Fund ('the Fund') and fixes statutory rates of contribution to the Fund. These rates are set as a percentage of 'wages' which under the EPF Act include 'any allowance ... in respect, either explicitly or impliedly, of high cost of living'. According to the Third Schedule of the EPF Act, the statutory rate of contribution applicable to these banks for these employees would be 11%. Although establishing this rate, there was nothing in the EPF Act to prevent negotiations over retirement benefits. An employer may voluntarily elect to contribute more to the Fund than the statutory rate. Furthermore it appears that an employer may give additional retirement benefits outside the Fund. Accordingly the employees and their representative unions are free to seek such benefits, as the appellant did here.

The respondent argued before the High Court that the Industrial Court acted in excess of jurisdiction by issuing an award fixing retirement benefits above the 11% required by the EPF Act. The learned judge considered it as the respondent's argument that the award directly breached a statutory provision and that it also denied the association certain rights, ie to elect and/or revoke payments above 11%. (Grounds at 3-4.)

The respondent also claimed that the court acted in excess of jurisdiction by making an award of benefits retrospective to the beginning of December 1985, by doing its own computations of the banks' EPF liability, upon interpretation of various provisions by the EPF Act and by failing to consider s 30(4) of the Act. We should add that the respondent also has said that the Industrial Court's analysis led it to a conclusion so unreasonable that no reasonable tribunal would arrive at it.

It is clear from the record and oral argument before us that the respondent did not complain of any breach of the principles of natural justice. Nor did the respondent claim that the court lacked jurisdiction to enter into the general inquiry it undertook. The disagreement over retirement benefits was clearly a trade dispute properly

before the Industrial Court upon reference made to it under s 26(1) of the Act.

As the learned judge in the court below recognized, the allegation of lack of jurisdiction or 'jurisdictional error' was used in a much wider sense. The principal argument of the respondent is that the Industrial Court lacked power in that it acted outside the scope of its authority when awarding retirement benefits in excess of the 11% set by the EPF Act. Indeed, the learned judge below granted certiorari on this ground alone, holding the excess to be an 'illegal payment and without basis whatsoever'.

In reply, it is the appellant's contention that the respondent consented to the Industrial Court reference and therefore agreed to abide to whatever was decided. The respondent contends that this consent could not give the court jurisdiction or power it does not already have. As this court said in *Federal Hotel Sdn Bhd* v *National Union of Hotel, Bar, and Restaurant Workers:*[4]

> It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction. (See *Essex County Council* v *Essex Incorporated Congregational Church Union* [1963] AC 808, 820, 821 (at pp 820-821 per Lord Reid.)

The respondent's argument would appear to be on all fours with the *Federal Hotel*[4] case if in the event the Industrial Court had decided a question that was not a trade dispute. But unlike the *Federal Hotel*[4] case where the tribunal acted beyond the statute creating both it and its jurisdiction; here the parties agreed to bring a trade dispute to a tribunal, fundamentally, is that the jurisdiction or powers created by the Act are further limited by the EPF Act. According to this argument, the EPF Act limit of 11% must be construed to deny power to grant some relief that would otherwise be within the Industrial Court's powers. Conceivably this was a case of a particular category of excess of jurisdiction as in *Non-Metallic Mineral Product Manufacturing Employees Union* v *Malaya Glass Factory Bhd,*[3] where an award provision relating to accident leave was found to conflict with the statutory liability scheme created by ss 31 and 42 of the Employees' Social Security Act 1969.

If, in the present case, the EPF Act said '11% and absolutely not a cent more' we might agree that the respondent's consent could not confer power on the Industrial Court to go beyond 11%. But such is not the position before us.

The distinguishing feature, however, is that in *Non-Metallic Mineral Product Employees' Union,*[3] the Industrial Court decided on a reference from the Minister of Labour acting of his own motion after the union had resorted to industrial action whilst in the present case, the appellant and the respondent mutually agreed to refer the dispute to the Industrial Court under s 26(1). The respondent in effect consented to have the Industrial Court decide this question and by so doing consented to abide by a decision that may be made by it in accordance with law.

This agreement to abide by the Industrial Court's decision leads us to another point. The respondent has argued that while the parties agreed to refer the quantum of retirement benefits, the Industrial Court decided the quantum of contributions to the EPF. And as such the Industrial Court had in fact asked itself the wrong question thereby making its decision a nullity on ground of excess or lack of jurisdiction.

In our view, it strains credulity to say that the Industrial Court could decide retirement benefits, but not rule on whether these would be contributions to the Fund. Section 30(6) of the Industrial Relations Act provides that:

> the court shall not be restricted to the specific relief claimed by the parties ... but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute....

It has been held in the past that this gives the Industrial Court considerable leeway in the relief it grants: *Dr A Dutt* v *Assunta Hospital.*[5] In the present case, the court must have considered the fact that fixing retirement benefits alone without saying how they would be invested would potentially leave the trade dispute unsettled.

Moreover, the respondent's argument suggests that we are not expected to read the record in this case. In its original statement of reply filed with the Industrial Court, the respondent itself described its own position on retirement benefits as a percentage contribution to the EPF. It cannot therefore be heard to say that the court approached the issue of benefits from the wrong perspective. The Industrial Court asked itself the question put to it by the parties and answered that question in the very terms used by both the appellant and the respondent.

In the grounds of his decision, the learned judge did not explicitly accept any of the respondent's other arguments against the award. It is, however, important to note that the Industrial Court's consideration of the intention of the parties, the history of retirement benefits for these workers, and the benefits enjoyed by other bank workers were all within its powers. So too was its calculation of EPF benefits. Errors in such calculations or in other factual considerations would not, in our view, go to the Industrial Court's jurisdiction. The Industrial Court award was dated 28 December 1985, but ordered that payments be effected as of the first of that month. The respondent has argued that this order made with retrospective effect conflicts with s 7(3) of the EPF Act.

We are of the view that there is no validity in the respondent's contention as it cannot be said that the Industrial Court acted in excess of the jurisdiction bearing in mind, firstly, that the retrospective date of the award is not in breach of or inconsistent with s 30(7) of the Act which reads:

> 30(7) An award may specify the period during which it shall continue in force, and may be retrospective to such date as is specified in the award;
>
> Provided that the retrospective date of the award may not, except in the case of a decision of the court under section 33 or an order of the court under section 56(2)(c) or an award of the court for the reinstatement of a workman on a reference to it in respect of the dismissal of a workman, be earlier than six months from the date on which the dispute was referred to the court.

Secondly, it was the court's function to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form and above all the fact that the parties had agreed to refer the dispute several months earlier.

For these reasons, we see no ground whatsoever for the court below to interfere with the award made by the Industrial Court. The order of the High Court is therefore set aside and substituted therefor an order that the application be dismissed with costs. The Industrial Court award is reinstated. The deposit shall be refunded to the appellant.

Order accordingly.

Solicitors: *Jayasuriya Kah & Co; Hj Mohd Noor, Dr Yaccob & Ismail.*

Reported by *Prof Ahmad Ibrahim*

Lorraine Phylis Cohen & Anor v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL NO 67 OF 1987
LEE HUN HOE CJ (BORNEO), MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
27 MARCH AND 24 APRIL 1989

Criminal Procedure – Written judgment delivered by judge of High Court – Whether learned judge can supplement the first judgment by delivering a second judgment or grounds of decision – Criminal Procedure Code (FMS Cap 6), s 278 – Rules of the Supreme Court 1980, r 105(1)(d) – Courts of Judicature Act 1964, s 52(1)

The applicants in this case had been convicted on charges for trafficking in dangerous drugs. At the conclusion of the trial on 1 September 1987, the first applicant was sentenced to death and the second applicant was sentenced to life imprisonment plus six strokes of the rotan. The learned trial judge handed down a 15-page judgment on 1 September 1987 which was dated and signed. Some 15 months later, he purported to hand down another judgment dated 10 December 1988. The applicants applied for an order that the judgment dated 1 September 1987 be the judgment to be included in the record of appeal and not the grounds dated 10 December 1988.

Held, granting the application:

Since there was already a written judgment signed and delivered on 1 September 1987, no second written judgment or grounds of decision could be delivered subsequently to supplement the first judgment. It is not competent for the learned judge to supplement the first judgment by delivering a second judgment or grounds of decision.

Cases referred to

1 *Nathan* v *PP* [1972] 2 MLJ 101 (folld)
2 *Ankur Nath Ganguli* v *PP* [1956] MLJ 206 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 52(1)
Criminal Procedure Code (FMS Cap 6) s 278
Rules of the Supreme Court 1980 r 105(1)(d)

Appeal from: Criminal Trial Nos 58-8, 58-9/1985 (High Court, Penang)

Karpal Singh for the applicants.
Gooi Soon Seng (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Lee Hun Hoe CJ (Borneo) (delivering the judgment of the court): We granted the application of the applicants for an order that the judgment dated 1 September 1987 delivered by Dzaiddin J be the judgment to be included in the record of appeal and not his grounds of judgment dated 10 December 1988. We stated that we would give our reasons later because of the importance of the issue involved. We do so now.

The two applicants are mother and son. Two charges were preferred against them for trafficking in dangerous drugs in Penang, contrary to s 39B(1)(a) and punishable under s 39(B)(2) of the Dangerous Drugs Act 1952. At the conclusion of the trial on 1 September 1987 the first applicant was sentenced to death and the second applicant was sentenced to life imprisonment plus six strokes of the rotan.

It is not in dispute that the learned judge handed down a 15-page judgment on 1 September 1987 which was dated and signed. Some 15 months later, he purported to hand down another grounds of judgment dated 10 December 1988.

Having filed their appeal the applicants wrote to the Senior Assistant Registrar, High Court, Penang for notes of proceedings and grounds of judgment. On 14 February 1989 the Senior Assistant Registrar stated, inter alia, that:

> Mr Justice Datuk Mohamed Dzaiddin had only given an 'oral written judgment' without stating his grounds of judgment which meant the learned judge had only read his 'written judgment' in open court without stating the grounds of his said decision after which he prepared his 'grounds of judgment' in writing.